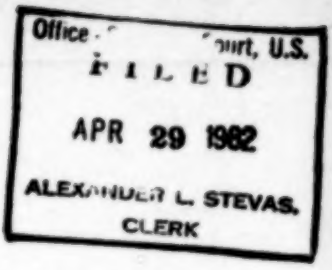
81-2187



NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NORMAN LEON GUTHERY,
PETITIONER

VS.

RITA GUTHERY,
RESPONDENT

WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

JOHN LEWIS SIMS, JR.
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QUESTION PRESENTED FOR REVIEW

This Court is asked to review decision by the Alabama Court of Civil Appeals, certiorari denied by the Alabama Supreme Court, which deprived Appellant of his right to an unbiased trial judge in a divorce case which is required by the applicable statutes in the State of Alabama.

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OPINIONS BELOW

The opinion of the court below, the Court of Civil Appeals of Alabama is reported as Guthery v. Guthery, Alabama Civil Appeals 409 So. 2d 844 (1982). The Circuit Court of Morgan County, Alabama did issue a decree. A copy of the opinion of the Court of Civil Appeals of Alabama is attached as Appendix B and a copy of the decree of the Circuit Court of Morgan County, Alabama is attached as Appendix C.

JURISDICTION

Appellant seeks to review denial or Writ of Certiorari by the Alabama Supreme Court on January 29, 1982, Writ was to the Alabama Court of Civil Appeals regarding its decision of November 4, 1981. The Alabama Court of Civil Appeals in this decision on November 4, 1981 reports as Guthery v. Guthery, Ala. Civ. App. 409 So. 2d 844, affirmed the lower court's decision, the Morgan County Circuit Court, and held that the trial court had not violated the Alabama Canons of Judicial Ethics, Canon 3(c)(1)(d) regarding the impropriety of a trial judge to hear a case in which certain relatives of the judge acted as an attorney.

The Supreme Court of Alabama made final the judgment of the Court of Civil Appeals which upheld the trial court's decision. Appellant did not file a motion for rehearing in the Supreme Court of Alabama because such a motion will not be received by that court when the subject is the motion is an order denying certiorari, Alabama Rules of Appellate Procedure 39(j).

On April 24, 1982 counsel for appellant filed a notice of appeal to the Supreme Court of the United States and to the Supreme Court of Alabama, and in the Court of Civil Appeals of Alabama, mailed the same to counsel for Appellee and has mailed the same to this Court along with his appearance.

This court's jurisdiction is invoked under 28 USC 1257(3). Cases which sustain this jurisdiction include: Stanton vs. Stanton, 421 US 7 (1975); Stanley vs. Illinois, 405 US 645 (1972); Reed vs. Reed, 404 US 71 (1971); and Levy vs. Louisiana, 391 US 68 (1968).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment XIV, Section 1, provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privleges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Alabama Canons of Judicial Ethics, Canon 3(c)(d)(i)(ii):

"A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:

(d) He or his spouse, or a person within the fourth degree of relationship to either of them, or spouse of such a person: (i) is named a party to the proceeding, or an officer, director or a trustee of a party. (ii) is known by the Judge to have an interest that could be substantially effected by the outcome of the proceeding."

STATEMENT OF THE CASE INCLUDING A RAISING AND RULING UPON THE FEDERAL QUESTION

This proceeding began in the Circuit Court of Morgan County, Alabama as a divorce action and the case was heard by Judge Tom B. Coggin and the Appellee was represented by Honorable Sherman B. Powell, Jr. After the divorce action and after various post trial

hearings and petitions Appellant raised the issue of a violation of the Alabama Canons of Judicial Ethics, supra. A subsequent trial judge denied Appellant relief and the matter was appealed to the Alabama Court of Civil Appeals which by its decision cited above affirmed the trial court's decision.

The Alabama Court of Civil Appeals noted that "Clearly in this case, the judge was disqualified to serve because he was related to the attorney within the proscribed degree and owned property jointly with him. The only way this disqualification can be remitted is for the judge to fully disclose his disqualification in the record and for the parties to agree to writing to allow him to hear the case. In the instant case the parties and their

attorneys were informed in open court of the disqualification, and the Appellant through his attorney agreed for the judge to hear the case. The agreement, however, was not reduced to writing"

Appellant raised the issue of the constitutional violation in this case in his belief to the Alabama Court of Civil Appeals, the Alabama Court of Civil Appeals made no mention of the issue of the constitutional violation in their opinion.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

This Court has apparently never ruled upon the question presented in this case. The comparable federal statute is found at 28 USC § 455 and

has been ruled upon by the Fifth United States Circuit Court of Appeals in the cases of Potashnick vs. Port City Const. Co., 609 F. 2d 1101, rehearing denied 613 F. 2d 314 and Port City Const. Co. v. City of Mobile, Al., 613 F. 2d 314, certiorari denied 101 S. Ct. 78. Fifth Circuit decided that the Appellant was entitled to a fair and impartial judge who was not kin to the parties involved and reversed a rather substantial matter involving multiple parties and great expense.

Simply stated, Appellant's argument is that the record reveals no waiver from him and the record shows there was no written agreement by the parties as required by the applicable Canon of Judicial Ethics

and Appellant contends that showed a violation of his rights guaranteed by the fourteenth amendment, supra.

CONCLUSION

The question presented in this appeal is substantial and of public importance and therefore required plenary consideration, with brief on the merits and oral arguments, for its resolution.

Respectfully submitted,

/s/ John L. Sims

JOHN L. SIMS

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

January 29, 1982

RE: 81-272
EX PARTE: NORMAN GUTHERY
PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS

(RE: NORMAN LEON GUTHERY vs. RITA GUTHERY
APPEALLANT APPELLEE

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

XXX Petition for Writ of Certiorari denied. No Opinion.

EMBRY, J., TOLBERT, C.J., FAULKNER, ALMON and ADAMS, JJ., CONCUR.

Clerk, Supreme Court of
Alabama

STATE OF ALABAMA

JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1981-82

Civ. 2610, 2736 & 2846

NORMAN LEON GUTHERY

v.

RITA GUTHERY

APPEAL FROM MORGAN CIRCUIT COURT

BRADLEY, JUDGE

This is a divorce case.

The wife, Rita Guthery, filed a complaint for divorce on July 3, 1980. The husband, Norman Leon Guthery, filed an answer on August 28, 1980. The case was tried September 8, 1980 and decree divorcing the parties and dividing on September 23, 1980. The petition alleged among other things that the husband

had harrassed the wife, had altered an automobile awarded the wife and he refused to give the wife a key to the residence awarded her and had refused to pay court awarded alimony and child support.

Various other motions were filed by the husband. Petition for rule nisi was heard by the trial court and resulted in a decree of contempt which was rendered on November 5, 1980.

The husband's motion for new trial which had been filed on October 10, 1980 was denied on December 3, 1980. On December 16, 1980 notice of appeal from the final decree of divorce, the contempt citation and the denial of the motion for new trial was filed.

The record reveals the following facts. The parties had been married

approximately nineteen years. The husband owns and operates a body shop which repairs wrecked automobiles. The wife has a tenth grade education, but has obtained a cosmetology manager's license. She has not worked for several years. She testified her medical condition prevented her from working. The couple had two male children: Rodney, age fourteen and Randy, age seventeen.

The decree divorced the parties on the grounds of incompatibility of temperament. The husband received custody of Randy and the wife received custody of Rodney. Visitation rights were set out in the decree. The husband was to pay $250.00 per month as child support for Rodney.

The wife was given $200.00 per month as periodic alimony for a period

of two years or until she dies, remarries, or becomes self-supporting, whichever comes first.

The divorce decree also gave Mrs. Guthery the house, a 1978 Trans Am automobile, and the household furnishings. Husband received his body shop business, all cars except the Trans Am, and his personal property.

Conflicting evidence was presented as to the value of the marital estate. The residence was valued at between $40,000 and $50,000. The husband's business had various estimates as to its value. The husband contended it was worth only $12,000 while other testimony placed the value at $100,000. The husband also contended his income was only $1,000 a month, but his accountant testified that husband earned $96,000 a year.

Several contempt proceedings have been brought since the initial decree. Wife claimed that husband altered the Trans Am by placing a wrecked hood on it instead of the hood that was on the car at the time of the initial decree. The hood was valued at $400.00.

On November 5, 1980, the husband was held in contempt by the trial court. He was ordered to pay wife $500.00 to repair the Trans Am. Wife was ordered to allow husband to obtain possession of some of his personal items.

The first issue we are asked to consider is whether the trial judge was disqualified from hearing this divorce case due to the fact that he and wife's attorney are brother-in-laws and own an airplane jointly.

Leave of this court was granted so that husband could file a motion

under A.R.C.P. 60(b)(6) to have the divorce judgment set aside because of the judge's disqualification. At the hearing on this motion, the original trial judge testified that he had disclosed his relationship to the wife's attorney and that the parties orally agreed to allow him to hear the case. As a result, the 60(b) motion was denied, and husband appeals this denial as well as other issues concerning the divorce decree.

It is clear to this court that under Canon 3(c)(1)(d) of the Canons of Judicial Ethics a trial judge is disqualified where it is found that he is related to one of the parties or attorneys within the fourth degree. Clearly in this case, the judge was disqualified to serve because he was

related to the attorney within the proscribed degree and owned property jointly with him. The only way this disqualification can be remitted is for the judge to fully disclose his disqualification in the record and for the parties to agree in writing to allow him to hear the case.

In the instant case the parties and their attorneys were informed in open court of the disqualification, and the appellant through his attorney agreed for the judge to hear the case. The agreement, however, was not reduced to writing.

Husband contends that since the judge was disqualified, the divorce decree is invalid and void. We cannot agree with this contention.

Our courts have held that a final judgment rendered by a judge who is disqualified to serve is merely voidable and not void. State ex rel. Burns v. Phillips, 250 Ala. 120, 33 So. 2d 239 (1947); Phillips v. State, 32 Ala. App. 238, 24 So. 2d 226 (1945). Furthermore, once a judgment becomes final, our courts are reluctant to overturn it.

It has been stated numerous times that motions under Rule 60(b) to set aside a judgment are meant for extraordinary circumstances. Textron, Inc. v. Whitfield, 380 So. 2d 259 (Ala. 1979); Charles Townsend Ford, Inc. v. Edwards, 374 So. 2d 900 (Ala. Civ. App. 1979). The final decree of divorce was rendered over one year ago. In view of this and

the evidence showing that the husband was informed at trial of the judge's disqualification and assented to his hearing the case, we do not find circumstances which warrant a conclusion that the provisions of Rule 60(b) should be invoked. See Reach v. Reach, 378 So. 2d 1115 (Ala. Civ. App. 1979), cert. denied, 378 So. 2d 1118 (Ala. 1980). It should be noted that at the 60(b) hearing the husband in no way disputed knowing of the judge's disqualification at the time of trial.

From this we cannot find that the husband's rights were so prejudiced that the one year old divorce decree should be invalidated. Even though technically the trial judge erred in not requiring the disqualification to be remitted in writing and incorporated

in the record, husband has not shown that he was prejudiced by the method used by the trial judge to remit his disqualification. Rule 45, A.R.C.P. Consequently, we affirm the denial of the 60(b) motion.

All of the rest of the issues raised by husband concern the alimony and property provisions of the divorce decree. The division of property is within the sound discretion of the trial court and will not be reversed absent a palpable abuse of discretion. Furthermore, there is no fixed standard for division of marital property. Kabaci v. Kabaci, 373 So. 2d 1144 (Ala. Civ. App. 1979).

In this case we find no error in awarding husband his business and wife the marital home. We also cannot find

error in the trial judge's award of personal property. If the parties cannot agree what constitutes "furnishings" in the decree, then their remedy is to ask the trial court to resolve the problem.

As to the alimony and child support provisions, those items are also in the sound discretion of the trial court. The court is to consider factors of age, health, station in life, etc. Kabachi v. Kabachi, supra. Clearly, alimony payments which will cease after two years are not an abuse of discretion considering the wife's inability to work. Neither can we find an abuse of discretion in the award of $250.00 per month and payment of medical and dental bills as child support. Ellison v. Ellison, 386 So. 2d 471

(Ala. Civ. App. 1980). The husband also contends that the court erred in finding him in contempt. The record, however, reflects that the husband did change the hood on the automobile and that he harassed the wife. From this we cannot find that the trial judge erred in holding the husband in contempt and in ordering the husband to pay wife $500.00 to put the motor vehicle in the condition it was in at the time the vehicle was ordered transferred to wife.

Finally, husband contends that it was error to deny him a new trial. The granting or denying of a motion for new trial is within the discretion of the trial court, and its decision is presumed correct. Taylor v. Birmingham News Co., 341 So. 2d 689 (Ala. 1977).

We find no abuse of discretion here.

The wife has requested an award of an attorney's fee on appeal. This request is granted and the wife is awarded $500.00 as an attorney's fee.

AFFIRMED.

Wright, P.J., and Holmes, J., concur.

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

RITA GUTHERY,	)	
	)	
PLAINTIFF,	)	
	)	CASE NO.
VS.	)	DR 80-453C
	)	
NORMAN LEON GUTHERY,	)	
	)	
	)	
DEFENDANT.	)	

DECREE

****

This case came on for trial on the 8th day of September, 1980 and was heard in open court with the parties and their attorneys present. At the close of the case the issues were taken under advisement. After consideration the Court is of the opinion the parties are entitled to a divorce upon the grounds of incompatibility of temperament. Therefore, it is,

ORDERED, ADJUDGED, AND DECREED by the Court that the parties are hereby

divorced from each other on the grounds of incompatibility of temperament. Both parties may remarry subject, of course, to the sixty day rule and forty-two day period for appeal.

The parties have two minor children, Randy age 17 and Rodney age 14. The care, custody and control of Randy is entrusted to Mr. Guthery . The care, custody and control of Rodney is entrusted to Mrs. Guthery. Each party is entitled to visit with the child not in their custody at all reasonable times and places with a minimum of every other weekend and every other major holiday such as Christmas, Thanksgiving, Easter, Fourth of July, Labor Day and the child's birthday. Mr. Guthery shall pay the sum of $250.00 per month for the support of Rodney and shall be responsible for any and all reasonable and necessary

medical and dental bills incurred on his behalf. Mrs. Guthery shall consult with Mr. Guthery before incurring any medical or dental bills for Rodney except in emergencies.

Mrs. Guthery is entitled to alimony in the sum of $200.00 per month for a period of two years or until she dies, remarries or becomes self-supporting whichever occurs first.

Mr. Guthery shall receive title to the following property:

1. The body shop business including the building and lot.

2. All cars except one 1978 Trans Am which shall be the property of Mrs. Guthery.

3. His guns, knives, safe, clothes, Grandpa's corn sheller, mule harness, etc.all of which are located in the residence of the parties.

4. One bar and one recliner.

5. Randy's bedroom suite and his stereo.

Mrs. Guthery shall receive title to the following:

1. The parties' residence and lot with the other improvements thereon.

2. A 1978 Trans Am auto now driven by Randy.

3. The furnishings at the residence not listed above.

Each party is ordered not to harass or pester the other and to cooperate in continuing to raise the two boys in the best possible manner. Done this 12th day of September, 1980.

/s/ Tom B. Coggins
CIRCUIT COURT JUDGE

I, Gaynell Hall, Register of the Circuit Court of Morgan County, Alabama hereby certify that the foregoing and attached is a true, complete, and correct copy of the Final Decree rendered by the Circuit Court of Morgan County, Alabama, in Equity, in the cause therein entitled. Witness my hand as Register aforesaid and the seal of said Court this 12 day of September, 1980.

/s/ Gaynell Hall
REGISTER

FILED IN OFFICE

SEP 12,'80

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1982
CASE NO.

NORMAN LEON GUTHERY,
APPELLANT

VS.

RITA GUTHERY,
APPELLEE

NOTICE OF PETITION FOR WRIT OF CERTIORARI

Please take notice that Appellant, Norman Leon Guthery, will file his Petition for Writ of Certiorari to the Supreme Court of Alabama and to the Court of Civil Appeals of Alabama.

/s/ John L. Sims

JOHN L. SIMS
Attorney for Appellant
P.O. Box 1122
Hartselle, Alabama 35640
(205) 773-1973

CERTIFICATE OF SERVICE

I hereby certify that I have on this 24th day of April, 1982 served a copy of the foregoing pleading on the Clerk of the Alabama Supreme Court and on the Clerk of the Alabama Court of Civil Appeals and on counsel for all parties to this proceeding by mailing the same by United States mail properly addressed and first class postage prepaid.

/s/ John L. Sims
JOHN L. SIMS
Attorney for Appellant
P.O. Box 1122
Hartselle, Ala. 35640
PH: (205) 773-1973

STATEMENT OF THE ISSUES

1. Did the Trial Court commit error in denying Defendant's Motion under Alabama Rule of Civil Procedures 60(b) on the issue of whether or not the original Trial Court should have recused himself due to his relationship with Plaintiff's attorney?

2. Did the original Trial Judge commit error in not complying with Alabama Canon of Judicial Ethics Canon 2 C., Canon 3 C., and Canon 3 D.?

3. Has Defendant been denied equal protection of the laws in this case?